Filed 3/30/10 P. v. Gutierrez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OMAR DELGADO GUTIERREZ,

Defendant and Appellant.

F058234

(Super. Ct. No. MCR035018)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Eric C. Wyatt, Judge.

Grace Lidia Suarez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Kathleen A. McKenna and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J., and Gomes, J.

INTRODUCTION

On April 17, 2009, a criminal complaint was filed charging appellant Omar Delgado Gutierrez with transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count one), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count two), and driving with a suspended license following a conviction for drunk driving (Veh. Code, § 14601.2, subd. (a), count three). The complaint further alleged two prior prison term enhancements.

On June 19, 2009, appellant waived his constitutional rights. Pursuant to a negotiated plea agreement, appellant pled no contest to count two in exchange for a prison sentence of 16 months and the dismissal of the remaining allegations. On July 24, 2009, the trial court sentenced appellant to a mitigated prison term of 16 months and determined appellant was not entitled to presentence custody credits.

Appellant filed a timely notice of appeal, but did not obtain a certificate of probable cause. Appellant contends the trial court erred in denying him presentence custody credits. We disagree and will affirm the judgment.

FACTS

On January 30, 2009, Madera Police Officers Gutknecht, Kutz, and Sheklanian stopped a vehicle driven by appellant.[1] Appellant was stopped and searched. Gutknecht located a clear plastic bag in appellant's right front pocket that contained approximately .1 gram of methamphetamine.

Appellant went before the parole board and "signed to receive seven months ineligible, flat time, and [was] scheduled to complete serving his violation of parole sentence on July 30, 2009." Appellant's parole agent reported the basis for appellant's

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[1] Because appellant waived his right to a preliminary hearing when he changed his plea, our statement of facts is derived from the probation officer's report.

violation of parole was his illegal reentry into the United States, providing false information to a peace officer, and the allegations in the instant action. In addition to a parole hold on appellant, there was also an immigration hold on him. Appellant admitted to the probation officer that he illegally reentered the United States twice after being deported in 2004 and in 2007.

The probation officer's report notes that appellant violated parole on January 30, 2009, the day he was arrested in the instant action. Appellant's parole was revoked on February 5, 2009, and he was returned to state prison.[2] The report further notes that appellant was deported in 2004 for being an aggravated felon and was again deported in 2008.

At the sentencing hearing, defense counsel argued that his incarceration was generated from his arrest in the instant action and but for appellant's commission of the instant offense, he would have been free of custody. Defense counsel argued there was no arrest warrant for appellant prior to his arrest on January 30, 2009, all of the violations of parole occurred from the same event, and the court should grant appellant presentence custody credits. The prosecutor argued that in addition to committing the instant offense, appellant was detained because he had illegally reentered the United States. Defense counsel replied that appellant was engaged in the same course and conduct, and it would be a violation of equal protection to treat him differently from a citizen merely because of his illegal reentry into the United States. The court found appellant's situation did not constitute a single set of circumstances and denied him presentence custody credits.

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[2] On May 19, 2009, the trial court signed an order to have appellant, who was then incarcerated in North Kern State Prison, transported to Madera County for arraignment in the instant action.

DISCUSSION

Appellant contends he was entitled to presentence custody credits. Appellant argues, however, that there was no outstanding parole warrant and no revocation hearing prior to his arrest in this action. Appellant states there is no evidence that his illegal reentry was a specific condition of parole and not simply a condition to obey all laws. Respondent points out that, according to appellant's parole officer, appellant violated parole by illegally reentering the United States. Respondent notes that appellant was on parole for a prior felony conviction and therefore his illegal entry into the United States violated federal law. (8 U.S.C., § 1326.) We agree with respondent and will affirm.

Appellant bases his claim on Penal Code section 2900.5 and *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*).[3] In *Bruner*, our Supreme Court held that where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a "'but for'" cause of the earlier restraint. (*Id.* at pp. 1193-1194.) When one seeks credit upon a criminal sentence for presentence time already served and credited on a parole or probation revocation term, he or she cannot prevail simply by demonstrating that the misconduct which led to his conviction and sentence was a basis for the revocation matter as well. (*Id*. at p. 1194.) As a general rule, a prisoner is not entitled to credit for presentence confinement unless he or she shows that the conduct which led to a

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3 Penal Code section 2900.5, subdivision (a) provides in pertinent part: "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, ... all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, ... shall be credited upon his or her term of imprisonment ...." However, subdivision (b) of Penal Code section 2900.5 specifies that "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted...."

conviction was the sole reason for his or her loss of liberty during the presentence period. (*Id.* at p. 1191.)

Respondent relies on *People v. Stump* (2009) 173 Cal.App.4th 1264 (*Stump*). In that case, the defendant was convicted of driving under the influence of alcohol with a prior felony within 10 years (Veh. Code, § 23152, subd. (a)) and driving with a blood-alcohol content of at least .08 percent with a prior felony within 10 years (Veh. Code, § 23152, subd. (b)). When the defendant was arrested and taken into custody on July 16, 2006, he was on parole at the time of his arrest. The defendant violated the terms of his parole by committing the two offenses and, at the time he committed those offenses, by drinking alcohol and driving without his parole officer's permission. (*Stump*, *supra*, at p. 1267.)

The defendant remained in custody through the date of sentencing in May 2008, and was arraigned with respect to the July 16, 2006, incident on December 20, 2006. (*Stump*, *supra*, 173 Cal.App.4th at p. 1268.) The court awarded credits for the period of December 20, 2006, through sentencing, but declined to grant credits for the defendant's period of custody from July 16, 2006, through December 20, 2006. (*Ibid*.)

On appeal, the defendant challenged the court's failure to award credits for the earlier period. The defendant asserted that period of custody was attributable to proceedings related to the same conduct for which he was convicted because there was only one single, uninterrupted, incident of misconduct and that one episode of criminal behavior may not be parsed into separate acts in order to deny the award of credit for revocation custody. (*Stump*, *supra*, 173 Cal.App.4th at pp. 1268, 1271.)

The court in *Stump* noted that *Bruner* was not directly on point because the decision there addressed a fact pattern with completely unrelated incidents, alleged parole violations and a subsequent cocaine possession. *Stump* found *Bruner* did not address a fact pattern where all of the acts in question were temporally related. (*Stump*, *supra*, 173

Cal.App.4th at p. 1271.) The question presented, the *Stump* court stated, was "how the *Bruner* 'but for' test should be applied when a defendant engages in a course of illegal conduct, such as drunk driving, that encompasses certain independent acts, none of which would be illegal per se, but each of which happens to be a separate ground for a parole violation, such as driving (without parole officer permission), or consuming alcoholic beverages in any amount." (*Ibid*.)

The court answered that question as follows: "In the case before us, the conduct for which defendant was arrested gave rise to two drunk driving charges (violations of Veh. Code, § 23152, subds. (a), (b)). It is not the case that 'but for' a drunk driving charge defendant would have been free of parole revocation custody. He still would have been held for driving, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. Likewise, he still would have been held for consuming alcohol, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. [¶] Penal Code 'section 2900.5 did not intend to allow credit for a period of presentence restraint unless the *conduct* leading to the sentence was the *true and only unavoidable basis* for the earlier custody.' (*Bruner*, *supra*, 9 Cal.4th at p. 1192.)" (*Stump, supra*, 173 Cal.App.4th at p. 1273.)

Stump reasoned that the conduct of driving under the influence of alcohol, for which defendant was sentenced in the underlying action, was not the only unavoidable basis for the custody because the act of driving without permission was a basis for the earlier custody. The act of drinking alcohol, irrespective of driving, was a basis for the earlier custody. Penal Code section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty. (*Stump, supra*, 173 Cal.App.4th at p. 1273.)

Similarly, in the instant case, appellant would not have been free of custody "but for" the allegations of the criminal complaint. Appellant argues, in effect, that he was

free because federal immigration authorities had not found him and there was no evidence of a warrant stating he violated parole prior to his arrest on this criminal complaint. We reject these arguments because appellant was in violation of his parole and federal law by illegally reentering the United States. The fact that authorities had not yet caught him prior to his arrest does not mean he was entitled to be free from custody "but for" the allegations of the instant criminal complaint.

Indeed, by definition, appellant's illegal reentry into the United States involved secrecy both from immigration authorities and his parole officer, otherwise appellant would have found himself again being deported or facing additional criminal charges pursuant to federal law (8 U.S.C., § 1326). A preexisting warrant for revocation of appellant's parole was likely impossible until after appellant was arrested on the allegations in this action because it is unlikely the authorities knew he was back in the United States.

The probation officer's report unequivocally indicates that appellant's parole was revoked on February 5, 2009, and he was incarcerated in state prison for illegally reentering the United States. The trial court had to issue a transfer order for appellant to be brought to Madera County from North Kern County State Prison for arraignment. Appellant's argument that there was no warrant for violation of parole in this record is irrelevant when the record indicates appellant's parole was already revoked and he was incarcerated in state prison pending prosecution of the instant action. In addition to the parole hold on appellant, the probation officer's report indicates the immigration authorities also had a hold on him.

It is the appellant who bears the burden of proof that the conduct that led to his conviction was the sole reason for his presentence confinement. (*Bruner*, *supra*, 9 Cal.4th at pp. 1193-1194, & fn. 10; *People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1259.) Appellant provided no evidence that would overcome this burden. Appellant was

incarcerated in state prison for violating his parole, in part, for illegally reentering the United States. For this reason, we find appellant's argument that he would have been free absent his arrest in this case to be unpersuasive.

Related to appellant's argument that he would have been free absent his arrest for possession of drugs is his contention that this was one continuous temporal event and his arrest was for no more than a failure to obey all laws. Appellant compares his case to *People v. Williams* (1992) 10 Cal.App.4th 827, 833-835 (*Williams*). There were multiple allegations in *Williams* but 12 allegations were dismissed. The trial court nevertheless used some of the dismissed allegations as the basis to reject presentence custody credits based on an erroneous theory that the dismissed counts created a "mixed conduct" case. (*Id*. at p. 834.)

Stump accurately noted that any one of the dismissed allegations in *Williams*, if proven, would have constituted a failure to obey all laws and could not be used as the basis for a probation violation because all of the allegations derived from a single course of criminal conduct. (*Stump*, *supra*, 173 Cal.App.4th at pp. 1272-1273.) In contrast to *Williams*, appellant here was not engaged in a continuous course of conduct. Prior to committing the offenses alleged in the criminal complaint, appellant illegally reentered the United States. This was a separate criminal act from the offenses alleged in the criminal complaint. Also, appellant's violation of immigration law constituted a separate violation of the parole condition that he obey all laws. This separate violation of the obey all laws condition of parole distinguishes this case from *Williams* because it began prior to, and remained a continuous violation of parole, before appellant illegally possessed narcotics. In *Williams*, the failure to obey all laws condition of probation involved only the allegations from a single course of criminal conduct, not from an additional and ongoing criminal act such as we have here.

Appellant has failed to carry his burden of proof that he would have been free of custody but for the allegations of the criminal complaint. Appellant was, in part, incarcerated in state prison prior to his arraignment in this case for violating his parole by illegally reentering the United States. In addition to a parole hold on appellant, immigration authorities also have a hold on him. The trial court did not err in denying appellant presentence custody credits.[4]

DISPOSITION

The judgment is affirmed.

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[4] The Legislature amended Penal Code section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender, and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment violates the intent of the Legislature and equal protection principles. We deem these contentions raised here.

We explained in the recent case of *People v. Rodriguez* (March 1, 2010, F057533) __ Cal.App.4th __ [pp. 5-12], however, that the amendment is not presumed to operate retroactively and does not violate equal protection under law. Even if appellant could receive presentence custody credits here, he would not be entitled to additional conduct credit under the amendment to Penal Code section 4019.